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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RAY F. SPEERS, TRUSTEE IN BANKRUPTCY OF THE KURTZ ROOFING COMPANY, f/d/b/a KURTZ SUPPLY COMPANY, BANKRUPT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The order of the district court (R. 43a)[1] is not officially reported. The opinion of the court of appeals (App. 9-16) is reported at 335 F. 2d 311.

[1] "R." references are to the record Appendix B printed as a part of the Brief for the Appellant in the court of appeals. "App." references are to the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1964 (App. 17). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien is valid in bankruptcy although notice of the lien is not filed before the date of bankruptcy.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof

has been filed by the Secretary or his delegate * * *.

* * * *

Bankruptcy Act, c. 541, 30 Stat. 544, as amended (11 U.S.C., Secs. 107, 110):

Sec. 67. *Liens and Fraudulent Transfers*—

* * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding * * * statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws * * *.

Sec. 70, *Title to Property.*

* * * *

c. * * * The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

STATEMENT

On June 3, 1960, the District Director assessed withholding taxes and interest totalling $14,149.08 against Kurtz Roofing Company and on the same day made demand for payment. On June 20, 1960, Kurtz filed a voluntary petition in bankruptcy. No notice of the federal tax lien was filed prior to bankruptcy. (R. 31a-33a). The trustee refused to recognize the United States as a secured claimant and instead treated it as an unsecured claimant entitled to the fourth priority that Section 64a(4) of the Bankruptcy Act gives for taxes legally due and owing (11 U.S.C. 104(a)(4)). The trustee proposed first to pay in full the claims of other secured creditors and administrative expenses and then to pay out of the $13,893.02 remaining in the bankrupt estate a dividend of 53.48 percent on the federal tax claims and on unsecured State and local claims (R. 29a-30a). The referee (R. 34a-41a), the district court (R. 43a), and the court of appeals (App. 9-16) sustained the position of the trustee.

The court of appeals based its decision on Section 6323(a) of the Internal Revenue Code of 1954 (*supra*, pp. 2-3) and Section 70c of the Bankruptcy Act (*supra*, p. 3). Section 6323(a) provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor unless notice thereof has been filed * * *." Section 70c provides that a trustee in bankruptcy shall be deemed vested, as of the date of bankruptcy, "with all the rights, remedies, and powers" of a creditor holding

a lien by legal or equitable proceedings as of the date of bankruptcy, whether or not such a creditor actually exists. Reading the provisions together, the court held that since Section 70c gives the trustee all the rights of a judgment creditor as of the date of bankruptcy, and since notice of the lien was not filed prior to bankruptcy, Section 6323(a) operated to invalidate the federal tax lien in bankruptcy.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the decisions of three other circuits. Review by this Court is necessary to resolve the conflict on an issue which recurs frequently and is thus of substantial administrative importance: whether notice of a federal tax lien must be filed before the date of bankruptcy if the lien is to be valid in bankruptcy proceedings.

1. As the court below noted (App. 13), its decision is in direct conflict with the decisions of the Second Circuit in *Brust* v. *Sturr*, 237 F. 2d 135; the Third Circuit in *In re Fidelity Tube Corp.*, 278 F. 2d 776, certiorari denied *sub nom. Borough of East Newark* v. *United States*, 364 U.S. 828; and the Ninth Circuit in *United States* v. *England*, 226 F. 2d 205, and *Simonson* v. *Granquist*, 287 F. 2d 489, reversed on other grounds, 369 U.S. 38. In *Simonson* v. *Granquist* this Court granted the trustee's petition for certiorari on the same issue now presented, although there was then no conflict of decisions (Oct. Term, 1960, No. 919, 366 U.S. 943). The Court's disposition of the case, however, made unnecessary a determination of the question (369 U.S. 38, fn. 1).

The question is a recurring one and has considerable administrative importance. We have been advised informally that there are approximately 1,250 bankruptcy cases each year involving federal tax liens, and that notices of liens are not filed before bankruptcy in approximately one-third of these cases, or about 400 cases a year. At present the issue is generally disposed of summarily upon the authority of the Second, Third, and Ninth Circuit decisions, but such summary disposition cannot continue in light of the decision below.

2. The government believes that the decision below is erroneous and that the conflicting decisions of the Second, Third, and Ninth Circuits are correct. Section 6323 of the Code, and its predecessor provisions, were intended to protect four classes of creditors against unfiled government tax liens. One of the protected classes is creditors who have obtained a court decree "in the usual, conventional sense of a judgment of a court of record * * *." *United States* v. *Gilbert Associates*, 345 U.S. 361, 364. A trustee in bankruptcy is not such a creditor and the Bankruptcy Act plainly was not intended to treat him as such a creditor for purposes of invalidating unrecorded federal tax liens. This is evident both from other provisions of the Act and from its purposes. The construction given Section 70c of the Bankruptcy Act by the court below cannot be reconciled with Section 67b of the same Act. Under the decision below no federal tax lien can be valid in bankruptcy if notice of the lien was not filed prior to bankruptcy. But Section 67b (*supra*, p. 3) states flatly that a

federal tax lien will be valid if it is perfected after bankruptcy "in accordance with the requirements" of the law creating the lien. Section 67b thus in terms permits what the court below held Section 70c impliedly prohibits: the perfection of the federal lien after bankruptcy.

The decision of the court below is also inconsistent with the purposes of the two statutes it construed. Invalidating all unrecorded federal tax liens grants no additional protection to general creditors, for the tax claim will still be paid ahead of general creditors as a fourth priority claim under Section 64 of the Bankruptcy Act. Nor does it afford added protection to the four classes of creditors referred to in Section 6323 of the Internal Revenue Code of 1954, for their claims are secured and superior to the federal lien by virtue of that section alone. On the other hand, the decision below grants an unexplainable and unjustified priority over federal tax liens to creditors with inchoate liens, even if acquired after the federal tax lien arose, so long as State law makes those liens superior to that of a judgment creditor. And it permits wholly unsecured tax claims of States and municipalities to share equally with the secured claims of the United States, despite the protective purposes of the federal tax lien. These results were not intended by Congress. See, 4 Collier, *Bankruptcy* (14th ed., 1962 rev.), pars. 70.47-70.49.[2]

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[2] Legislation repeatedly has been proposed in recent years to constitute a trustee in bankruptcy a "judgment creditor" with respect to federal tax liens. The most recent bill was H.R. 394, 88th Cong., 2d Sess., Sec. 6. None of these bills

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys.

NOVEMBER 1964.

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has been enacted into law. The committee reports on these bills all underscore the fact that only Congressional action can accomplish this result. For example, see S. Rep. No. 1133, 88th Cong., 2d Sess., pp. 10-11, on H.R. 394.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15405

In the Matter of

THE KURTZ ROOFING COMPANY,
d/b/a KURTZ SUPPLY COMPANY,
Bankrupt,
UNITED STATES OF AMERICA,
Appellant,

v.

RAY F. SPEERS, Trustee in Bankruptcy, *Appellee*.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided August 4, 1964.

Before: CECIL and O'SULLIVAN, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. Section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6323(a), protects a "judgment creditor" against unfiled federal tax liens. This appeal requires us to decide whether Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), confers upon a trustee in bankruptcy

the right of a judgment creditor to resist imposition on the bankrupt's assets of a federal tax lien not filed prior to bankruptcy. The referee in bankruptcy and the District Judge held that the trustee had such right, and treated the government on a par with other priority claimants, as provided in Section 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a). We agree with this ruling. Under it, the government will receive 53.48% of $14,149.08, the amount for which it asserts a lien.

The government taxes here involved were assessed against Kurtz Supply Company on June 3, 1960. That company was adjudicated a bankrupt on June 20, 1960. Under Sections 6321 and 6322 of Int. Rev. Code of 1954, 26 U.S.C. §§ 6321, 6322, the asserted federal tax lien was perfected as of the date of assessment and demand, June 3, 1960. Section 6323(a) of the Code, however, provides that:

> ". . . the lien imposed by section 6321 *shall not be valid* as against any mortgagee, pledgee, purchaser, or *judgment creditor* until notice thereof has been filed by the Secretary or his delegate . . . ." (Emphasis supplied.)

No such notice was filed in this case prior to bankruptcy.

Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), provides in pertinent part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankrutpcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding

> a lien thereon by such proceedings, whether or not such a creditor actually exists."

The question before us, then, is whether the words "a creditor then holding a lien" upon the bankrupt's assets "by legal . . . proceedings" describe, among others, a judgment creditor. If so, the bankruptcy trustee, under 70(c), has all the rights of such judgment creditor. A judgment creditor becomes such by *legal proceedings* and obtains a lien on his debtor's assets by the levy of an execution. He then, indeed, is "a creditor . . . holding a lien thereon." We believe that in using the broad language now contained in 70(c), Congress deliberately avoided precise definition of the various types of lienholders whose status it conferred on the trustee in bankruptcy. Prior to 1950 and 1952 amendments to Section 70(c), a distinction was drawn between property of the bankrupt which came into the possession of the bankruptcy court and that which did not. As to the former, the trustee was deemed vested "with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings" just as he is under the present wording without regard to possession. As to property not coming into possession of the court, however, he was deemed vested "with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied . . . ." To be sure, Congress in these amendments dropped explicit mention of judgment creditors and eliminated, for purposes of the trustee's rights, the distinction between property coming into his possession and that which does not. But "the legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to *expand* the rights of a trustee in bank-

ruptcy . . . ." *In re Fidelity Tube Corp.*, 278 F. (2) 776, 781 (3rd Cir. 1960). (Emphasis supplied.) We are persuaded that Congress intended to strengthen, not weaken, the trustee's rights against all forms of secret liens and retained the broader language, once used only as to property within the court's possession, so as to include all forms of lienholders, whether by judgment, levy of execution, or otherwise.

A trustee in bankruptcy obviously is not in fact a judgment creditor, but by Congressional Act he is "deemed vested . . . with all the rights, remedies, and powers" of a judgment creditor. One of the "rights, remedies, and powers" of a judgment creditor is the right to resist a government lien for taxes where notice thereof is not filed as required by Section 6323 (a). The Bankruptcy Act does not say that the special rights conferred by Section 70(c) shall be effective against all liens except those for taxes imposed under Section 6321 of the Revenue Code. We do not understand the government to deny the general propriety of this reading. Instead, it asserts that although "Section 70c may give a trustee in bankruptcy *some of the rights of a judgment creditor*," and accords him "the status of a *hypothetical judgment creditor*," he does not have a judgment creditor's right to resist the lien here involved. (Emphasis supplied.) No convincing reasons of policy are advanced for such an interpretation, which departs from the clear language of the statutes involved. Sections 70 (c) of the Bankruptcy Act and 6323(a) of the Internal Revenue Code of 1954, indeed, are both successors to statutes adopted to prevent the evils of secret liens, whether asserted by the United States or other creditors of a bankrupt. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 363-64, 97 L. Ed. 1071,

1075 (1953); *Sampsell* v. *Straub*, 194 F. (2) 228, 231 (9th Cir. 1951), *cert. denied*, 343 U. S. 927, 96 L. Ed. 1338 (1952). Accordingly, we are unable to agree that unrationalized concern for federal revenues should lead us to judicially amend a statute which expressly confers on the trustee not *some*, but *all* of the rights of a creditor holding a lien arising from legal proceedings.

Our view is at odds with majority opinions of the Second, Third and Ninth Circuits which have held for the government on the point here involved. *Brust* v. *Sturr*, 237 F. (2) 135 (2nd Cir. 1956); *In re Fidelity Tube Corp.*, 278 F. (2) 776 (3rd Cir. 1960), *cert. denied sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828 (1960); *United States* v. *England*, 226 F. (2) 205 (9th Cir. 1955); *Simonson* v. *Granquist*, 287 F. (2) 489 (9th Cir. 1961), *reversed on other grounds*, 369 U. S. 38 (1962). Notwithstanding our respect for the learned judges of the majority in these cases, we find more persuasive the views expressed by the dissenters in *Fidelity Tube*, 278 F. (2) 782-787, and by Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 490-491. We must concede too that our holding here appears to put us also in disagreement with dictum used in our own decision of *In re Taylorcraft Aviation Corp.*, 168 F. (2) 808, 810 (6th Cir. 1948). The dictum in that case was really in the nature of an aside observation because Section 70(c) of the Bankruptcy Act was not involved at all. Judge Allen, in dealing with the priority in bankruptcy of a mechanic's lien over a federal tax lien, *notice of which had been filed*, took occasion to say, "The trustee was not a judgment creditor . . . *and hence § 3672, Title 26, U. S. C., 26 U. S. C. A. Int. Rev. Code, § 3672 (predecessor to § 6323 I. R. C., 1954), has no application.*" (Emphasis supplied.)

Our present decision does not conflict with Judge Allen's observation that a trustee in bankruptcy is not a judgment creditor since we rule only that Section 70(c), not considered by Judge Allen, gives him the *rights* of a judgment creditor.

The above decisions, with which we disagree, appear to hold that language employed by the United States Supreme Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364, 97 L. Ed. 1071, 1075 (1953), requires that we hold for the government. The *Gilbert* case did not deal with the Section 70(c) rights of a trustee in bankruptcy. The opposing claims there involved were based on a federal tax lien and a tax lien assessed by the Town of Walpole, New Hampshire. The Supreme Court of New Hampshire had given priority to the town tax because of its holding that the assessment of a municipal tax " 'is in the nature of a judgment.' " The United States Supreme Court declined as a matter of federal law to accord the municipal or state taxing authority the status of a judgment creditor within the meaning of the lien statute. In so ruling, the Court said ". . . we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." We do not feel that this language compelled the holdings of the cases with which we disagree and upon which the government here relies. It is our view that *Gilbert's* holding that a municipal tax creditor is not a "judgment creditor" for purposes of Section 6323(a), regardless of its status under state law, is inapposite to the question now before us. Such view, we believe, is supported by the reasons expounded in Judge Kalodner's dissenting opinion in *In re Fidelity Tube Corp.*, 278 F.

(2) 785-86. We agree, too, with the statement of Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 491:

> "But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by Act of Congress, the same legislative body was free to extend its benefits however it pleased."

We think that Judge Hamley spoke correctly in stating, "In my view this statute (§ 70(c)) states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one." *Ibid.*

An alternative position taken by the government in its brief to this Court is that even though the notice required by Section 6323(a) was not filed prior to bankruptcy, its lien gained priority over the trustee's title to the bankrupt's assets in February, 1961, at which time, it is claimed, a notice thereof was filed with the proper state authority. Reliance is placed on Section 67(b) of the Bankruptcy Act, 11 U.S.C. § 107(b). This contention is first made in the government's brief to this court and was not presented to or considered in the bankruptcy proceedings or on review by the District Judge. The referee's certificate on review recited that "no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, Ohio, nor the office of the Clerk of Court for this Judicial District." This was not challenged in the District Court. In his brief here, government counsel states "we have examined the record *in this case* and have found that

notice of lien was filed with Carl A. Speir, Recorder, Erie County, Ohio, . . . on February 9, 1961. . . ." (Emphasis supplied.) From our own examination of the record *in this case*, we fail to find that such information constituted any part of the record. It is supplied by attaching to the government's brief a certified copy of a notice, obtained from the Recorder of Erie County on July 15, 1963. This date is after the filing of Notice of Appeal on April 17, 1963, and the filing of the record on appeal in this court on May 23, 1963.

Aside from our surface impression that there is no merit to this position of appellant, we will not consider a matter that was not before the District Court. *In re Frank Fehr Brewing Co.*, 268 F. (2) 170, 183 (6th Cir. 1959), *cert. denied*, 362 U. S. 963 (1960).

Judgment affirmed.

JUDGMENT

(Filed Aug. 4, 1964)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

/s/ Clifford O'Sullivan,
United States Circut Judge

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